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Lim Chai Oon & Anor v Normah bte Ismail & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL APPEAL NO 12-40-91
JAMES FOONG J
28 MAY 1994

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Damages (Personal Injury or Death) *— Fatal accident — Contributory negligence — Whether damages reduced proprotionately — Whether deduction could be made for income earned by dependant from deceased's estate — Whether income was a benefit — Civil Law Act 1956 ss 7, 8, 12(4)*

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On 1 May 1988, a motor car driven by the first defendant and owned by the second defendant collided with a motor cycle ridden by the first plaintiff's husband ('the deceased') and their daughter, the second plaintiff, who was seriously injured. The first plaintiff brought this dependency claim against the defendants for herself and her children under s 7 of the Civil Law Act 1956 ('the Act'). The sessions court judge found that the first defendant and the deceased were equally to be blamed for the accident. However, the judge awarded damages of RM300 per month to the first plaintiff based on 100% liability, following the High Court decision in *Veronica Joseph, an infant & Anor v Tu Kon Lin & Anor* [1987] 1 CLJ 81. The defendants appealed. The issues were: (i) whether the dependency loss should be reduced according to the percentage of liability attributed to the deceased; and (ii) whether a deduction should be made to take into account the income derived by the first plaintiff from taking over and managing the deceased's Felda estate.

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Held, allowing the appeal:

(1) Section 12(4) of the Act clearly states that in actions brought under ss 7 and 8, the damages recoverable shall be reduced proportionately to the extent of the deceased's fault. There is no requirement that the deceased's estate must be heard or made a party before apportionment of damages as indicated in *Veronica Joseph*'s case. As the beneficiaries of the estate are usually also the dependency claimants, the practice stated in *Veronica Joseph*'s case should not be encouraged so as to avoid a multiplicity of suits on the same subject matter. The damages were therefore reduced by 50%.

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(2) The money earned by the first plaintiff should not be deducted from the dependency loss as it was a result of her own labour and not a gain resulting from the deceased's death. In a dependency claim, the dependants are not required to mitigate their losses.

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(3) The dependency loss should be replaced with the agreed sum of RM500 per month instead of RM300. The awards were: RM18,000 for pre-trial loss, ie RM500 x 36 months; RM36,000

for post-trial loss, ie RM500 x 72 months; and special damages of RM11,800. All amounts are to be reduced by 50%.

[Bahasa Malaysia summary

Pada 1 Mei 1988, sebuah motokar yang dipandu oleh defendan pertama dan dimiliki oleh defendan kedua telah berlanggar dengan motosikal yang ditunggang oleh suami plaintif pertama ('si mati') dan anak perempuan mereka, plaintif kedua, yang mengalami kecederaan parah. Plaintif pertama telah membawa tuntutan kehilangan tanggungan ini terhadap defendan bagi pihak dirinya sendiri dan anak-anak beliau di bawah s 7 Akta Undang-Undang Sivil 1956 ('Akta itu'). Hakim mahkamah sesyen memutuskan bahawa defendan pertama dan si mati sama-sama bersalah atas kemalangan itu. Bagaimanapun, hakim itu telah mengawardkan ganti rugi sebanyak RM300 sebulan berdasarkan liabiliti 100%, mengikut keputusan Mahkamah Tinggi di dalam kes *Veronica Joseph, an infant & Anor v Tu Kon Lin & Anor* [1987] 1 CLJ 81. Defendan telah membuat rayuan. Isu yang timbul adalah: (i) sama ada kehilangan tanggungan seharusnya dikurangkan mengikut peratus liabiliti yang ditanggung oleh si mati; dan (ii) sama ada suatu penolakan seharusnya dibuat untuk mengambil kira pendapatan yang diperolehi oleh plaintif pertama daripada mengambil alih dan menguruskan ladang Felda si mati.

Diputuskan, membenarkan rayuan itu:

(1) Seksyen 12(4) Akta itu jelas menyatakan bahawa di dalam tindakan yang dibawa di bawah ss 7 dan 8, ganti rugi yang boleh diperolehi akan dikurangkan berkadar dengan takat kesalahan si mati. Tidak ada keperluan bahawa harta pusaka si mati mesti didengar atau dijadikan suatu pihak sebelum pengumpukan ganti rugi boleh dibuat seperti yang dinyatakan di dalam kes *Veronica Joseph*. Oleh kerana benefisiari sesuatu harta pusaka juga biasanya merupakan orang tanggungannya, amalan yang dinyatakan di dalam kes *Veronica Joseph* tidak seharusnya digalak supaya dapat mengelakkan bilangan guaman yang banyak mengenai perkara yang sama. Oleh demikian, ganti rugi itu dikurangkan sebanyak 50%.

(2) Wang yang diperolehi oleh plaintif pertama tidak seharusnya ditolak daripada kehilangan tanggungan kerana ia merupakan suatu hasil kerjanya sendiri dan bukan suatu keuntungan yang diakibatkan oleh kematian si mati. Di dalam suatu tuntutan untuk kehilangan tanggungan, orang tanggungan itu tidak dikehendaki mengurangkan kehilangan mereka.

(3) Kehilangan tangunggan itu seharusnya digantikan dengan jumlah yang dipersetujui sebanyak RM500 sebulan dan bukannya RM300. Award yang diberikan adalah: RM18,000 untuk kehilangan sebelum perbicaraan, iaitu RM500 x 36 bulan;

A RM36,000 untuk kehilangan selepas perbicaraan, iaitu RM500 x 72 bulan; dan ganti rugi khas sebanyak RM11,800. Kesemua jumlah tersebut mesti dikurangkan sebanyak 50%.]

Notes

B For cases on contributory negligence in damages, see 1 *Mallal's Digest* (4th Ed) paras 1791, 1797, 1799, 1808, 1813; 6 *Mallal's Digest* (4th Ed) para 265.

For cases on deductions in dependency claims, see 1 *Mallal's Digest* (4th Ed) paras 1801, 1804, 1805, 1816, 1828; 6 *Mallal's Digest* (4th Ed) paras 325, 327.

C For cases on damages for personal injuries and death, see [1989] Mallal's Digest 661–733; [1990] Mallal's Digest 498–575; [1991] Mallal's Digest 970–1036; [1992] Mallal's Digest 849–913.

Cases referred to

D *Davies & Anor v Powell Duffryn Associated Collieries Ltd* [1942] 1 All ER 657; [1942] AC 601 (refd)

Goodger v Knapman [1924] SASR 347 (follld)

Howitt v Heads [1973] 1 QB 64; [1972] 1 All ER 491; [1972] 2 WLR 183 (follld)

Maxfield v Llewellyn [1961] 3 All ER 95; [1961] 1 WLR 1119 (distd)

E *Mallet & Anor v Dunn* [1949] 1 All ER 973; [1949] 2 KB 180 (distd)

Veronica Joseph, an infant & Anor v Tu Kon Lin & Anor [1987] 1 CLJ 81 (not follld)

Yap Ami & Anor v Tan Hui Pang [1982] 2 MLJ 316 (distd)

F **Legislation referred to**

Civil Law Act 1956 ss 7, 8, 12

Fatal Accidents Act 1976 s 5 [GB]

Law Reform (Contributory Negligence) Act 1945 s 1(1) [GB]

G *RA Kumar* (*Rina Noor & Co*) for the appellants.

S Gunasegaran (*John Ang & Jega*) for the respondents.

James Foong J: This is an appeal by the defendants against the decision of the sessions court judge who:

H (a) awarded damages to the first plaintiff based on 100% liability against the defendants even though the court had found both the defendants and the deceased's husband of the first plaintiff 50:50 to be blamed for the motor accident and;

(b) awarded a sum of RM300 per month as dependency loss to the first plaintiff without making any deduction for the benefits she derived from her husband's death. I

The facts of this case are not disputed and neither is the finding on liability by the trial judge. It is as follows: On 1 May 1988, a collision occurred

between a motor car driven by the first defendant and owned by the second defendant with a motor cycle ridden by one Fadzin bin Abu (deceased) with the second plaintiff, his daughter, as a pillion rider. As a result of this accident, the deceased succumbed to death while the second plaintiff was seriously injured. The first plaintiff, the widow of the deceased, brought this action against the defendants on a dependency claim for herself and seven of her children under s 7 of the Civil Law Act 1956 ('the Act').

The sessions court judge found that the first defendant and the deceased were equally to be blamed for the said accident. However, as bound by a High Court decision in the case of *Veronica Joseph, an infant & Anor v Tu Kon Lin & Anor* [1987] 1 CLJ 81, the sessions court judge awarded damages to the first plaintiff based on 100% liability. In respect of quantum, besides special damages and other items agreed upon, the sessions court judge found a sum of RM300 per month as the amount of dependency loss due to the first plaintiff.

In this appeal, counsel for both the defendants and the plaintiffs agreed that there are only two issues for this court's consideration.

The first is whether the first plaintiff, being a dependant, is subjected to a reduction in damages according to the percentage of liability attributed to the deceased in the motor accident. The second is whether a deduction should be made to the dependency loss when there is evidence to show that the dependant has derived benefits from the deceased's death.

On the first issue, the defendants relied on s 12(4) of the Act. Section 12(4) reads as follows:

> Where any person dies as the result partly of his own fault and partly of the fault of any other person or persons, and accordingly if an action were brought for the benefit of the estate under section 8, the damages recoverable would be reduced under subsection (1), any damages recoverable in any action brought for the benefit of the dependants of that person under section 7 or for the benefit of the husband of that person under proviso (iii) of subsection (3) of section 7 or of the spouse or parents under subsection (3B) of section 7 shall be reduced to a proportionate extent.

It is the contention of the defendants' counsel that in the second limb of s 12(4) above, the law clearly provides that any damages awarded for the benefit of any dependant who brings an action under s 7 of the Act, should be reduced proportionately to the extent of the deceased's liability (if any) in an accident. In this case, the action by the first plaintiff is brought under s 7 of the Act and, there is a finding by the trial judge that the deceased is 50% to be blamed for the accident that causes his own death. Under such circumstances, the award to the first plaintiff should be proportionately reduced by 50% and not based on 100% liability against the defendants.

The defendants' counsel proceeded to argue that the case of *Veronica Joseph*, which the trial judge relied on, is wrong in law and contradicts the clear provision of s 12(4) of the Act.

Section 12(4) of the Act clearly states that in an action brought by a dependant under s 7 of the Act, damages recoverable by the dependant shall be reduced proportionately to the extent of the deceased's fault in the

A accident. There is no ambiguity in the wording of this particular section of the Act which expressly provides for application to claims made both under ss 7 and 8 of the Act. To impose any other requirements which are not stated in this particular section of the Act would be tantamount to the courts writing into a statute, provisions which do not exist therein. This is particularly so with the requirement of having the deceased's estate made B a party and/or be heard before apportionment of awards in situations mentioned above can be made, as indicated in *Veronica*'s case [1987] 1 CLJ 81. This function is certainly not within the parameters of the judiciary, whose duty is to interpret the law as stated by the legislature. Failure to adhere to this function would result in the collapse of the principle on the C separation of powers between the executive, legislature and the judiciary which is practised in our country.

The case of *Maxfield v Llewellyn* [1961] 3 All ER 95; [1961] 1 WLR 1119, used as a supportive authority for the principle expounded in *Veronica*'s case is not applicable to the situation expressed in s 12(4) of the D Act. In *Maxfield v Llewellyn*, the widow of the deceased pillion rider of a motor cycle brought an action against the driver and owner of a cattle truck that went into the path of the deceased's motor cycle, collided into him and caused his death. Also named as defendants in this action were the driver and owners of a post office van, which van was parked in such a manner that could have caused the cattle truck to proceed onto the path E of the oncoming deceased's motor cycle. The trial judge awarded dependency loss based on 100% liability of the cattle truck. The driver and owner of the cattle truck appealed on the ruling that no contributory negligence was decided against the post office van. The House of Lords ruled that 'there cannot be apportionment unless all the parties are before F the court or, at any rate, unless the action of all parties is considered' (Ormerod LJ in [1961] 3 All ER 95 at p 97; [1961] 1 WLR 1119 at p 1121).

By this the House of Lords was actually referring to the absence of the rider (as differing from the pillion rider whose widow was the plaintiff in the action) of the motor cycle as a party to the action. The rider who G also succumbed to death as a result of this road accident was not named either as a plaintiff or defendant in the action. It was the view of the House of Lords that unless all parties are before the court, apportionment of damages should not be considered.

In a situation such as in our present case there is no question of the H deceased's position not being considered. The dependency claimant in order to succeed has first to prove negligence of the defendant. By so doing, evidence would have been tendered on the position of the deceased in the accident. When a conclusion on liability is arrived at by the trial judge, the position of the deceased would have been considered. In our I present case, the deceased was found 50% to be blamed. Under these circumstances, I see no purpose being served by having to bring the deceased's estate, as suggested in *Veronica*'s case, as a party to this action before apportionment of a dependency sum can be made under s 12(4) of the Act.

In addition, in virtually all cases of this nature, the beneficiaries of the estate consist of the same set of people as the dependency claimants. As there should be no multiplicity of suits on the same subject matter, the proposed practice stated in *Veronica*'s case should not be encouraged.

The other supportive authority for the principle expounded *Veronica*'s case is *Mallet & Anor v Dunn* [1949] 1 All ER 973; [1949] 2 KB 180. It is the opinion of this court that s 12(4) of the Act was not considered in *Mallet & Anor v Dunn*. *Mallet & Anor v Dunn* only considered the question of contributory negligence, that is s 1(1) of the British Law Reform (Contributory Negligence) Act 1945, which is identical to our s 12(1) of the Act. No mention whatsoever was made to s 5 of the Fatal Accidents Act 1976 which is in pari materia to our s 12(4) of the Act. Possibly this particular provision was not enacted in England at the material time when this case was decided. When such a relevant piece of law is not being considered, this case should be distinguished.

For reasons stated above, this court finds that the sessions court has erred in awarding the first plaintiff damages based on a 100% liability. This award of damages should be reduced by 50% which is the proportionate blame attributed to the deceased in accordance with s 12(4) of the Act.

I shall now turn to the second issue. As a result of the deceased's death, the first plaintiff took over the Felda estate of her deceased husband. After paying expenses, she obtained a nett income of RM425 per month from it.

The defendants submitted that this sum of RM425 is a benefit occurring to the first plaintiff as a direct result from the death of the deceased and, should be taken into account to reduce the dependency claim following the decision handed down by the House of Lords in *Davies & Anor v Powell Duffryn Associated Collieries Ltd* [1942] 1 All ER 657; [1942] AC 601. As the sum of RM500 is agreed upon by the parties to be the dependency loss at time of deceased's death, a deduction of RM425 should be made thereto. By this, the dependency sum would be reduced to RM75 per month. In further support for this contention, the defendants tendered to this court the case of *Yap Ami & Anor v Tan Hui Pang* [1982] 2 MLJ 316. In *Yap Ami*'s case, after the death of the deceased, the dependant widow of the deceased continued to receive the same amount of money as the deceased had been getting from the firm in which the deceased was a partner. The High Court ruled that she suffered no loss and as such was not entitled to compensation.

It is an accepted general principle that benefits occurring to the dependant by reason of a deceased's death should be taken into account to reduce a dependency claim. However, these benefits should not be derived at the expense and effort of the dependant. In this case, the first plaintiff widow proceeded to manage the deceased's Felda estate and due to her own ability, ingenuity and industry she managed to earn RM425 per month. There is no necessity for her, as a housewife, to work since in a dependency claim, there is no law to insist upon the dependants to mitigate their losses. If the first plaintiff did not carry out the work on the

A Felda estate, she would still be entitled to the dependency loss of RM500 per month. In this case, as she did work by virtually toiling the land with her own hands, the money she earn should not be deducted from the dependency loss. This earning of the first plaintiff is a result of her own labour and not a gain resulting from the deceased's death.

B The principle is similar to that adopted in the Australian case of *Goodger v Knapman* [1924] SASR 347 where Murray CJ remarked:

> I am unable to see how liberty to work can be reasonably brought within the description of a pecuniary advantage she had derived from the death of her husband. Any money she might earn, would be the result of her labour and not of his death ...

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This principle also found favour in the English case of *Howitt v Heads* [1973] 1 QB 64; [1972] 1 All ER 491; [1972] 2 WLR 183.

Yap Ami's case [1982] 2 MLJ 316, cited by the defendants' counsel, ought to be distinguished from the facts of the case itself. In that case, the D dependant widow did not expend any effort or energy of her own in getting the payment from her deceased husband's former firm. The firm just continued to pay the dependant widow in the same amount and manner as if the deceased's husband was still alive. She did not even 'lift a finger to earn that amount'. However, in our present case the situation is otherwise.

Under these circumstances, I reject the defendant's second contention.

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In the light of this court's findings aforesaid, I allow this appeal with costs and vary the order of the sessions court to as follows:

(a) The dependency sum should be replaced with a sum of RM500 per month instead of RM300.

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(i) As a multiplier for pre-trial loss of dependency is agreed upon at 36 months, the sum to be awarded for pre-trial loss for the first plaintiff should be RM500 x 36 = RM18,000.

(ii) As a multiplier for post-trial loss of dependency is agreed upon at 72 months, the sum to be awarded for post-trial loss to the first G plaintiff should be RM500 x 72 = RM36,000.

(b) There should be no change in the award for special damages which were agreed upon by the parties at RM11,800 to the first plaintiff.

(c) The above sums for both general and special damages should be reduced to 50% and paid by the defendants to the first plaintiff H together with interest and costs as stated by the sessions court.

As for the second plaintiff, there should be no change in the sessions court order for the awards granted to her are not affected by this appeal.

Appeal allowed.

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Reported by Anne Khoo